IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2006 Session

STATE OF TENNESSEE v. JAMES PHILLIP CHAPPELL

Appeal from the Circuit Court for Dickson County
No. CR7397 Robert E. Burch, Judge

No. M2005-00425-CCA-R3-CD - Filed August 17, 2006

The defendant was indicted by the Dickson County Grand Jury with two alternative theories for driving under the influence ("DUI"). Before trial, the trial court determined that the results of a breath alcohol test were not admissible under State v. Sensing, 833 S.W.2d 412 (Tenn. 1992), but would be admissible with the proper foundation of expert testimony under Rules 702 and 703 of the Rules of Evidence. Midway through the trial, the defendant pled guilty to DUI reserving a certified question of law concerning the trial court's pre-trial ruling. The defendant pled guilty under Tennessee Code Annotated section 55-10-401(a)(2), which requires for a conviction that the defendant have a blood alcohol content of at least .08%. The trial court sentenced him to eleven months and twenty-nine days, suspended after the service of forty-eight hours. The defendant was also assessed a fine of $350. We affirm and remand the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ALAN E. GLENN, J., joined.

Timothy V. Potter and Lindsay C. Barrett, attorneys for the appellant, James Phillip Chappell.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and W. Ray Crouch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 20, 2004, Officer Bronson Morgan with the Dickson Police Department saw a vehicle, driven by the defendant, traveling at 52 miles per hour in a 35 mile per hour zone. He began to pursue the defendant. When he caught up to the defendant, Officer Morgan turned on his

blue lights and stopped him. Officer Morgan asked the defendant for his driver's license, registration and insurance information. While the defendant was retrieving the documents, Officer Morgan noticed that the defendant's speech was slurred and there was a strong odor of alcohol on his breath. After running his license, Officer Morgan asked the defendant to step out of the vehicle. There were two other officers present at the time.

Officer Morgan informed the defendant that he wanted to complete some field sobriety tests. The defendant told the officer that he had had a glass of wine. The defendant stepped out of the car. Officer Morgan administered the one-legged stand task, the ABC task, the fingertip to nose task, and the nine step heel to toe task. The defendant was unable to adequately complete any of the tasks. Officer Morgan arrested the defendant and took him to the police department. Once at the police department, Officer Morgan observed the defendant before administering the breath alcohol test. The defendant's blood alcohol level according to the breath alcohol test was .16.

In September of 2004, the Dickson County Grand Jury indicted the defendant for two counts of DUI. On January 10, 2005, the defendant filed a motion to suppress the results of the breath alcohol test results. Following a hearing held on January 12, 2005, the trial court ruled that, "[t]he motion is sustained in the respect that the Sensing test may not be used as to presumption of reliability. At the trial, if the State wishes to produce an expert and so forth, we'll revisit the issue."

The defendant filed a motion in limine on January 13, 2005, requesting that the breath alcohol test evidence be excluded from trial. The defendant's trial began that same morning. The trial court addressed the defendant's motion in limine following expert testimony held out of the hearing of the jury. The trial court denied the defendant's motion in limine and ruled that the State had met the requirements under Rules 702 and 703 of the Tennessee Rules of Evidence to admit the test results into evidence. Soon after, the court adjourned for the day.

The following morning, the defendant announced that he would like to plead guilty, while reserving a certified question for appeal. The trial court accepted a guilty plea from the defendant to the second count of the indictment, which is DUI found at Tennessee Code Annotated section 55-10-401(a)(2). This statute requires proof of a certain blood alcohol content. The defendant pled to first offense DUI and was sentenced to eleven months and twenty-nine days all suspended after service of forty-eight hours. He was also assessed a fine of $350. The defendant now appeals the judgment of the trial court through a certified question of law.

ANALYSIS

The defendant reserved the following certified question of law for review on appeal: "Whether the trial court correctly ruled that the results of the Defendant's breath alcohol test may

be admitted into evidence via expert testimony despite the fact that the State was unable to satisfy the requirements of State vs. Sensing, 833 S.W.2d 412 (Tenn. 1992)?"[1]

Under Rule 37 of the Tennessee Rules of Criminal Procedure:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment . . . must contain a statement of the dispositive certified question of law reserved by a defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved . . . also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case.

State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996) (quoting State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988)). The burden is on the defendant to satisfy the mandatory requirements of Rule 37. Preston, 759 S.W.2d at 650. This Court does not have jurisdiction to address issues that are not properly certified under Preston and such appeals are subject to dismissal. Id.

The defendant has met all the procedural requirements under Rule 37 to present a certified question to this Court. However, the State argues that the certified question is not dispositive of the case. For a question to be dispositive we "must either affirm the judgment or reverse and dismiss. A question is never dispositive when we might reverse and remand . . . if we . . . decided the question on its merits and found in favor of the defendant." State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984).

The defendant was indicted for two theories of DUI under Tennessee Code Annotated section 55-10-401(a)(1) and (2). The first theory is the common law offense and requires that the State prove that the defendant be "under the influence of any intoxicant." The second theory requires that the State prove a blood alcohol concentration of eight-hundreths of one percent (.08%) or more. The defendant pled guilty to DUI under the second theory based upon his blood alcohol content. The indictment under the common law theory was dismissed when the defendant pled guilty. Because the offense to which the defendant pled guilty requires that his blood alcohol be .08%, the admissibility of the results of the breath alcohol test, which is the only evidence of the defendant's

[1]The defendant actually argues two issues in his brief, the first is essentially the certified question and the second is: whether the trial court erred by admitting the results of the defendant's breath test without the expert testimony of reliability being presented to the jury. We point out that when a defendant pleads guilty the only basis for appeal is his sentence, unless he has certified a question for appeal. When the defendant does reserve a question, that issue is the sole issue this Court can address on appeal. See Tenn. R. Crim. P. 37(b)(2). Therefore, we are unable to address the defendant's other issue.

blood alcohol level, would be dispositive of the case. See State v. Terry A. Hawkins, No. M2002-01819-CCA-R3-CD, 2004 WL 735028, at *3 n.1 (Tenn. Crim. App., at Nashville, Dec. 9, 2003), perm. app. denied, (Tenn. Nov. 15, 2004); State v. George W. Gurley, No. W2001-02253-CCA-R3-CD, 2002 WL 1841754, at *3 (Tenn. Crim. App., at Jackson, Aug. 6, 2002).

Therefore, we now turn to the certified question as presented by the defendant. The question is whether the trial court properly ruled that the breath alcohol test may be admitted through expert testimony. This Court has stated, "[w]e conclude that if the state does not proceed under Sensing, the state must proceed under the Tennessee Rules of Evidence and a foundation which ensures reliability of the test results must first be established before the evidence is permitted." State v. Deloit, 964 S.W.2d 909, 913 (Tenn. Crim. App. 1997). In a later case, this Court again approved, "laying an evidentiary foundation through expert testimony on the reliability of the scientific test performed." State v. Korsakov, 34 S.W.3d 534, 542 (Tenn. Crim. App. 2000). We have repeated this rule in other cases. See State v. Brent Tod Perkins, No. E2001-01826-CCA-R9-CD, 2002 WL 1925614, at *4 (Tenn. Crim. App., at Knoxville, Aug. 21, 2002); State v. John H. Childress, No. M1999-00843-CCA0R3-CD, 2000 WL 994364, at *3 (Tenn. Crim. App., at Nashville, July 7, 2000), perm. app. denied (Tenn. Feb. 12, 2001); State v. Alaric Barret Crouch, No. M1999-02057-CCA-R3-CD, 2000 WL 31859, at *2 (Tenn. Crim. App., at Nashville, Jan. 18, 2000), perm. app. denied (Tenn. Sept. 18, 2000); State v. Ronnie L. Graham, No. 02C01-9711-CR-00444, 1998 WL 855461, at *2-3 (Tenn. Crim. App., at Jackson, Dec. 10, 1998).

Therefore, we conclude that the trial court correctly ruled that expert testimony could be used to establish an evidentiary foundation for the admission of the results of a blood alcohol test.

The defendant's judgment reads: "Defendant was arrested on February 20, 2004 at 11:23 a.m. and was released on February 4, 2004 at 12:01 p.m." Clearly there is a typographical error in the judgment. We remand to the trial court for entry of an amended judgment.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court and remand for a corrected judgment pursuant to this opinion.

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JERRY L. SMITH, JUDGE